The Return of the Christian Burial Speech Case

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by

Philip E. Johnson*

I. INTRODUCTION

If the police discover the body of a murder victim by unconstitutionally interrogating the suspected killer, must evidence derived from the corpse be suppressed as "tainted fruit" of the constitutional violation? That question was raised but not decided by the Supreme Court in the "Christian burial speech case," Brewer v. Williams.¹ This 1977 decision, one of the most important of the post-Miranda² confession cases, held that a police officer violated a murder suspect's right to counsel by attempting to elicit incriminating statements from him after formal judicial proceedings had commenced, even though the officer did not literally "interrogate." The case has now returned to the Supreme Court for argument in the 1983 Term,³ after a guilty verdict on retrial. It raises interesting and important questions concerning the scope of the "fruit of the poisonous tree" doctrine, and the proper balance to be struck between due process values and the desirability of convicting persons who commit horrible crimes. The case also comes to the Court with tantalizing suggestions from the defense that Williams, whose guilt was unquestioned at the time of the previous Supreme Court decision, might not have committed the murder after all.

What follows is in the nature of a roadmap to a complex and confusing case. The reader who knows a little about the case may find that some of what has been written about it is not true, and that there is a great deal more that is true and worth knowing.

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Part II gives a history of the trials, appeals, and habeas corpus proceedings that have consumed so many years. Part III discusses the legal issues in the current Supreme Court review, and Part IV comments on the prospects for a retrial in the event that the Supreme Court once again overturns the conviction. I conclude with some observations about policemen, lawyers, and abstract principles.

II. The History

A. The First Round

The crime occurred on Christmas Eve, 1968. Ten-year-old Pamela Powers, attending an event with her family at the Des Moines, Iowa, YMCA, excused herself to go to the bathroom and never came back. About half an hour later, several persons saw Williams leave the YMCA carrying a blanket-wrapped bundle, which he placed in the front seat of his car. A boy who assisted him with the doors “saw two legs in it and they were skinny and white.” Williams managed to drive away before other witnesses could see what he was concealing. The police correctly concluded that the bundle contained Pamela’s body.

Williams drove east across Iowa on Interstate 80. Police found his car abandoned in Davenport, near the Illinois border, and they also found the blanket and some of Pamela’s clothing at a rest stop near Grinnell, between Des Moines and Davenport. On December 26, Williams telephoned a Des Moines lawyer named McKnight, and surrendered to police at Davenport on McKnight’s advice.

McKnight went to the Des Moines police station and spoke to Williams on the telephone from there after the surrender. Des Moines Police Chief Nichols and Captain Leaming were present, and heard McKnight’s end of the conversation. McKnight told Williams that Captain Leaming would bring him back to Des
Moines by car, that Leaming would not question him during the trip, and that he should not discuss the case with anyone until he could confer with McKnight. McKnight also told Williams that he would have to reveal the location of the body to the police after his return to Des Moines. Although no one testified that Leaming or Chief Nichols made any explicit promise not to question Williams on the return trip, various judges later decided that the police had agreed, perhaps by their silence, to McKnight’s terms. This is the background for the state trial court finding, later to assume great importance, that the police dishonored a promise.

Captain Leaming and another officer went to Davenport and picked up the prisoner, who had been arraigned there on the murder warrant and repeatedly advised of his constitutional rights. Shortly after leaving Davenport on the 160 mile return trip, Leaming delivered his notorious “Christian burial speech,” in which he urged “Reverend” Williams (an escaped mental patient with strong religious tendencies) to ponder the desirability of stopping en route to locate the body (before anticipated snowfall could conceal it) so that the girl’s parents could give her a “good Christian burial.” Although the speech was not in the form of a ques-

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7 See infra note 73 and accompanying text.

8 See Brewer, 430 U.S. at 401 n.8 (Stewart, J., writing for the majority); id. at 410 (Powell, J., concurring)(concurrence refers to “express agreement”)(italics in original); id. at 415 (Stevens, J., concurring). Justice Stevens even imagined that Williams had surrendered on the basis of a negotiated agreement between McKnight and the police. The telephone call and conversation at the Des Moines police station occurred after the surrender, however.

9 “Captain Leaming’s testimony is less clear than it ought to be as to just when he rendered his now famous Christian burial speech. The best reading of the record . . . is that it occurred only a short time after they left the Davenport area and entered the freeway.” Kamisar, Foreward: Brewer v. Williams — A Hard Look at a Discomfiting Record, 66 Geo. L.J. 209, 215 (1977), reprinted in Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 113-37 (1980).

10 The Supreme Court opinion says that Leaming addressed Williams as “Reverend” and then went on to say:

I want to give you something to think about while we’re traveling down the road . . . Number one, I want you to observe the weather conditions, it’s raining, it’s sleetling, it’s freezing, driving is very treacherous, visibility is poor, it’s going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past
tion or demand for information, it clearly was intended to appeal to Williams' conscience and to influence him to show the police where he had hidden the body. It had this intended effect. Some hours later, as the car approached the Des Moines area, Williams took the officers to the body hidden in a ditch about two miles off the Interstate.

The state courts affirmed the resulting conviction for murder, but the federal courts on habeas corpus concluded that Detective Learning had violated Williams' *Miranda* rights and ordered a new trial. When the State of Iowa took the case to the Supreme Court in the 1976 Term, many observers thought the Court might take the occasion to overrule the controversial *Miranda* doctrine itself. Instead the majority opinion by Justice Potter Stewart surprised nearly everyone by brushing aside the *Miranda* arguments and re-invigorating the obscure doctrine of *Massiah v. United States*, a case which had held that even noncoercive surreptitious questioning of an accused person after formal adversary judicial proceed-

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the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

**Brewer**, 430 U.S. at 392-93. This account of the speech is taken from Leaming's testimony at the suppression hearing. Williams gave a different account which does not mention anything resembling a "Christian burial speech." According to Williams, Leaming persistently urged him to show the police the body before going all the way to Des Moines, explaining at one point that it would be bad for McKnight's health to require him to go along on the search for the body. Brief for Petitioner, Joint App. at 48, 71, Brewer v. Williams, 430 U.S. 387 (1977).

11 State v. Williams, 182 N.W.2d 396 (Iowa 1970).


13 An organization called Americans for Effective Law Enforcement, joined by the Attorneys General of numerous states, filed a brief urging the Court to reconsider *Miranda*. The invitation seemed to be well timed. *Miranda* had been a 5-4 decision, and only two members of that majority remained on the Court in 1977. The five Justices appointed by Presidents Nixon and Ford were thought to be fairly reliable "conservative" votes on constitutional criminal procedure questions. In retrospect Brewer v. Williams was an unfortunate test case from a law enforcement perspective, however, because of the "broken promise" issue and Justice Stewart's personal devotion to the *Massiah* principle. See infra note 15.

ings have commenced violates the Sixth Amendment right to counsel. The Court's choice of the Sixth Amendment-based Massiah doctrine rather than the Fifth Amendment-based Miranda doctrine has been exhaustively analyzed by able scholars, including Professors Yale Kamisar, Joseph Grano, and Steven Schulhofer. For present purposes this arcane distinction is probably unimportant: it is enough to say that five of nine Supreme Court Justices thought that Leaming violated Williams' constitutional rights by directing the Christian burial speech at him after he and his attorney had made clear that he did not wish to answer questions. Two of the Justices in the majority wrote concurring opinions emphasizing the violation of an "express agreement" by the police, relying, of course, on the trial court findings to this effect. That brings us to the point most directly at issue now: What is the appropriate remedy for this violation?

Williams never confessed to the killing, but he implicitly admitted hiding the body by taking the officers to it. The fact that he led the police to the body had to be suppressed at any retrial, of course, but what about the body itself? Scientific evidence derived from the body established that the girl had been sexually abused and smothered. Without this, there would have been nothing but
a mysterious disappearance, linked inferentially to Williams’ blanket-wrapped bundle. As it happened, the police found the body because Williams led them to it, but they might well have found it anyway. In lawyers’ jargon, the body was within the “inevitable discovery” or “hypothetical independent source” exception to the “fruit of the poisonous tree” doctrine, if there is such an exception and if the body would have been discovered (in adequate condition for obtaining the scientific evidence) absent the constitutional violation. Whether the exception exists remains debatable to this day, but the Supreme Court majority in Brewer v. Williams gave the concept a helpful boost in a footnote at the close of its opinion. There was no basis, the footnote said, for the dissenters’ fears that retrial would necessarily be futile:

While neither Williams’ incriminating statements themselves nor any testimony describing his having led the police to the victim’s body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. Killough v. United States, 119 U.S. App. DC 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.21

B. The Second Round

Of course, the state prosecutors took the hint. The new trial proceeded to another conviction for first degree murder and the Iowa Supreme Court affirmed in 1979,22 eleven years after the crime. The Iowa Court concluded that the State had shown by a preponderance of the evidence that the body would have been found ab-

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21 Brewer v. Williams, 430 U.S. at 406-07 n.12 (emphasis added).
sent the defendant's admissions.\textsuperscript{23}

Williams had concealed the body beside a culvert in a ditch alongside a road in Polk County about two miles north of Interstate 80, the main highway across Iowa. Captain Leaming had quickly surmised that Williams had disposed of the body somewhere near the Interstate before he discarded the blanket and clothing. Search parties were organized to inspect all roads, ditches and culverts within seven miles north and south of the Interstate, beginning at the farthest likely point east and proceeding westward. The search had proceeded to the Polk County line, which was about two and one-half miles east of the location of the body. There it terminated, for reasons that are in dispute, at about the time that Williams agreed to show Leaming where he had placed the corpse.\textsuperscript{24} After Leaming's discovery the search was never resumed, but an officer testified that the volunteer searchers would have continued into Polk County if necessary and would have inspected the ditch where the body was found. He claimed that the searchers would have found the body within a few hours, but the Iowa Supreme Court thought a longer delay would not have been critical, since the extreme cold of an Iowa winter would preserve a corpse until the spring thaws.\textsuperscript{25}

There could have been another reason for supposing that the

\textsuperscript{23} Id. at 262.

\textsuperscript{24} The volunteer searchers were supervised by Special Agent Ruxlow of the Iowa Bureau of Criminal Investigation. Ruxlow testified at the suppression hearing in the state court before the second trial in 1977, and at the federal district court habeas corpus hearing in 1981. Brief for Petitioner, Nix v. Williams, Supreme Court No. 82-1651, at 29-58, 126-70.

Ruxlow's testimony came many years after the events in question, and his credibility was challenged because he knew that successful re-prosecution of Williams depended upon establishing that the searchers would have found the body. He related that the search began at about 10:00 a.m., and was intended to go "around the clock." \textit{Id.} at 33. Nonetheless he and the other supervising agent simply abandoned the search at 3:00 p.m., when they were instructed to join Captain Leaming (returning from Davenport with Williams) at the Grinnell rest stop. Subsequently they followed Leaming's car to Mitchellville, and the party discovered the body at about 5:45 p.m. \textit{Id.} at 40, 48.

Ruxlow testified that he was not told why he was to accompany Leaming, but he was "under the impression" that Williams was going to lead the group to the body. \textit{Id.} at 57, 148. Probably this was his understanding, because otherwise his abrupt abandonment of the search in mid-afternoon with the searchers still out on the roads is difficult to explain.

\textsuperscript{25} Id.
body would not have remained hidden for long. McKnight had told Williams that he would have to reveal the location of the body when he got back to Des Moines, and Williams himself repeatedly promised Leaming that he would “tell you the whole story” after he saw McKnight. Justice Thurgood Marshall, concurring in the 1977 Supreme Court decision overturning the first conviction, surmised that McKnight planned to ask Williams the body’s location in confidence, and then relay the information to the police in such a manner that Williams would not be admitting guilty knowledge. Of course, there was no commitment binding against either McKnight or Williams if they chose to reconsider. Upon further reflection McKnight might well have decided that it is not a defense lawyer’s job to help the police find critical incriminating evidence. The subject of promises was a sore topic in any event, because Detective Leaming had supposedly broken his “promise” not to question Williams. In the circumstances, the Iowa Supreme Court did not speculate on what help the defense might have given the search parties if things had turned out otherwise.

Although the scientific evidence derived from the body was admitted at the second trial, the fact that Williams had conducted the police to it was of course excluded pursuant to the 1977 Supreme Court decision. Absence of this implied admission was un-

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27 The testimony on this point is summarized in Kamisar, supra note 9, at 229 n.88.
28 Leaming and Williams agreed on this point. According to Williams, Leaming’s main argument during the ride was that Williams might as well take the police directly to the body since otherwise he would just have to take them back to it after seeing McKnight in Des Moines. See Kamisar, supra note 7, at 229-30.
29 Brewer v. Williams, 430 U.S. at 408 (Marshall, J., concurring).
30 The trial court did cite the statements by Williams and McKnight as evidence that the defense would have disclosed the location of the body in any event. Brief for Appellant at 22, State v. Williams, 285 N.W.2d 248 (Iowa 1979). Williams’ attorneys argued to the Supreme Court of Iowa that “if Defendant had disclosed the body’s location on advice of his attorney, without steps to insulate him from evidentiary use of information derived therefrom, Defendant would have been deprived of the effective assistance of counsel.” Id. at 34-35. Presumably the prosecutors or police would never have agreed to forego any evidentiary use of the body. For reasons to be explained subsequently in this paper, I do not agree that counsel would necessarily have violated his duty to his client if he had advised Williams to tell the police where the body was. It is, of course, quite a different question whether the State should be allowed to use this defense “commitment” to undo the consequences of Captain Leaming’s misconduct.
31 See supra text accompanying note 22.
important, however, because the defense conceded that Williams had carried the body from the YMCA and concealed it in the ditch. The defense theory was that someone else had killed the girl and planted the body in Williams' room at the YMCA. Assuming he would be blamed, Williams panicked and fled with the body.\textsuperscript{31} This is precisely the story we would expect a guilty defendant to invent in the circumstances but, according to the federal Court of Appeals, "the theory is not so far-fetched as it sounds."\textsuperscript{32}

It is important to go into the facts bearing on factual guilt even though that question is theoretically irrelevant to the constitutional issue before the Supreme Court. All the Supreme Court dissenters in 1977 emphasized that the defendant was unquestionably guilty of a horrible crime,\textsuperscript{33} and Justices in the majority dropped some not-very-subtle hints that they assumed that something would be done to prevent the release of a dangerous sex killer.\textsuperscript{34} On the other hand, Judge Arnold's opinion for the federal Court of Appeals granting habeas corpus on the second round went out of its way to explain that Williams' guilt was "not undisputed."\textsuperscript{35} Williams is a black man, a drifter, and an escaped mental patient, who was accused of a horrible murder of a white child and tried before an all-white jury. That such a person could be mistakenly convicted on circumstantial evidence is a distinct possibility. If some members of the Supreme Court suspect that this may have

\textsuperscript{31} The defense theory is summarized in Williams v. Nix, 700 F.2d 1164, 1168 (8th Cir. 1983). See also State v. Williams, 285 N.W.2d at 270.

\textsuperscript{32} Williams, 285 N.W.2d at 270.

\textsuperscript{33} Brewer v. Williams, 430 U.S. at 416 (Burger, C.J., dissenting); Id., at 437 (White, J., dissenting); Id., at 441 (Blackman, J., dissenting). These dissenters also expressed doubt that a retrial would be feasible.

\textsuperscript{34} See supra text accompanying note 21. Justice Marshall's concurring opinion observed that "given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any chance a dangerous criminal will be loosed on the streets . . . ." 430 U.S. at 408. The most recent federal Court of Appeals opinion also invited the Iowa authorities to consider a civil commitment proceeding as an alternative to a third criminal prosecution. Williams v. Nix, 700 F.2d at 1173. I am disturbed by the notion that we can use a civil mental commitment proceeding as a means for confining a murderer or a child molester when for some reason we cannot prove that he committed a crime. In my opinion this practice is far more likely to subvert our liberties than any number of police violations of the Massiah or Miranda rules.

\textsuperscript{35} Williams v. Nix, 700 F.2d at 1168 n.4.
occurred, they may be inclined to look with favor on whatever claims of procedural error are presented.\textsuperscript{36}

Due to broadened discovery rights, the defense attorneys for the second trial obtained certain reports from the prosecution that were not provided at the first trial. These included a report that, although acid phosphatase (a component of semen) was found in the girl's body, no traces of spermatozoa were present.\textsuperscript{37} This sug-

\textsuperscript{36} Counsel for Williams and the State of Iowa apparently agree with the statement in the text. See infra note 39.

\textsuperscript{37} Des Moines newspaper reports about the newly obtained evidence and the second trial are summarized in Kamisar, supra note 9, at 210 n.4.

Expert testimony at the second trial was in conflict over whether freezing conditions would tend to preserve or destroy evidence of spermatozoa in human semen. Professor George Sensabaugh of the School of Public Health at the Berkeley Campus of the University of California, a specialist in this type of evidence, informed me that it should be possible to find traces of sperm under such conditions even if the sperm were "dead." He also advised me, however, that the analyst may have overlooked evidence of sperm, and that it is a common practice for analysts not to report evidence of sperm fragments where no intact sperm were present. Furthermore, Williams would not necessarily be excluded as the semen donor even if sperm traces were totally absent, because temporary aspermia may be caused by repeated ejaculation or other factors.

Professor Sensabaugh suggested an attempt to obtain the original laboratory reports and other evidence pertaining to the chemical analysis to determine if traces of sperm fragments were overlooked or unreported. Unfortunately, the original reports and other material were destroyed by the private laboratory that kept them. Letter from Brent R. Appel, Deputy Attorney General of Iowa (September 14, 1983)(on file with the author).

Professor Sensabaugh subsequently suggested another possibility. Private pathology laboratories are notorious for testing rape evidence by the standard used in the clinical test for elevated serum acid phosphatase (used for detecting prostatic cancer). The difference is critical, because the threshold for detecting acid phosphatase in serum is far below the threshold used for detecting semen traces. If the clinical test was used, minute traces of acid phosphatase naturally present in the victim's bodily fluids may have been reported even if no semen was present. Absence of semen due to ejaculatory failure is not uncommon in sexual assault cases. Letter from Prof. George Sensabaugh (September 27, 1983) (on file with the author).

In short, it is entirely possible that there was no evidence of spermatozoa because there was no semen. This possibility fits with the testimony previously described, that there was evidence of sexual abuse but not penetration. See supra note 20.

While this article was in press I received a copy of a letter to Professor Sensabaugh from Dr. Garry F. Peterson, Assistant Medical Examiner for Hennepin County, (Minneapolis) Minnesota. Dr. Peterson testified as an expert witness in the second trial, in support of the defense theory that observable traces of spermatozoa should have existed if Pamela was indeed raped by a sperm-excreting male. Dr. Peterson wrote to Professor Sensabaugh that the report of the autopsy (performed in a funeral home by an elderly osteopath who was extremely feeble by the time of the second trial) was the worst he had seen in many years of
gested that the rapist might have been sterile, and Williams was not sterile when tested in 1977. Ironically, the disputed corpse thus became a prime source of evidence for the defense.

The defense had a prime candidate for the role of alternate suspect: one Albert Bowers, a janitor who was employed cleaning washrooms at the YMCA at the time Pamela disappeared during a trip to a washroom. A witness named Boucher, also living at the YMCA, gave a deposition in which he described hearing an altercation from Bowers' adjoining room at about the time of the murder, after which Bowers made furtive preparations to depart. Bowers had died in an automobile accident in 1971, but his remains were exhumed and examined for evidence of sterility before the second trial. The medical report was not officially disclosed, but it must have been disappointing to the defense because Bowers' name was preparing and reviewing such reports. The fragmentary report mentioned a "positive acid phosphatase test," but the examining physician had not noted and could not remember where the testing had been done or what test had been made. Dr. Peterson thinks it likely that the testing was incompetently performed, and he notes that, "Time and again I have seen experienced microscopists overlook spermatazoa that are present." Letter from Garry F. Peterson, M.D. to Dr. George F. Sensabaugh (October 5, 1983) (on file with author).

Dr. Peterson could have told the court and jury at the second trial that the likely explanation for the absence of spermatazoa was that the autopsy was botched. He was asked only about the effect of freezing temperatures upon spermatazoa, and not about the quality of the autopsy, probably because neither side wanted to develop this point. It would be risky for the prosecution to discredit the evidence it was relying upon to prove that the victim was raped and smothered, and the defense wanted the jury to believe that the autopsy had established conclusively that Pamela was raped by a sterile man.

According to Williams' defense attorneys, Bowers (like Williams) had "a history of child molestation." Cedar Rapids Gazette, June 15, 1977, at 1A.

The Boucher deposition was taken on June 16, 1977, more than eight years after the event. Brief for Appellant at 84, State v. Williams, 285 N.W.2d 248 (Iowa 1979). It is described on page 27 of the Respondent's Brief in Opposition to the State's Petition for Writ of Certiorari in Nix v. Williams, U.S. Supreme Court No. 82-1651. Respondent's brief states that "Inexplicably, the Boucher testimony was not offered at trial." Id.

The Iowa Attorney General's Reply Brief responds on this point that the State was prepared to offer medical evidence from the exhumation that Bowers, like Williams, was not sterile. Defense counsel presumably concluded that any attempt to pin the crime specifically on Bowers would undercut the claim that the rapist must have been sterile. Petitioner's Reply Brief in United States Supreme Court No. 82-1651 at 4 n.2.

Of course, the possibility that another man may have been involved in the crime would not necessarily mean that Williams was innocent.

Des Moines Register, July 13, 1977, at 1A, 16A.
not mentioned at the trial. The defense argued that the killing could have been committed by an unidentified sterile man who then left the body in Williams' room. Williams himself did not testify on the merits at either trial, although he did testify at the suppression hearings.

The affirmance of the second conviction in the state courts led to a new round of federal habeas corpus. The District Court denied relief, but the Court of Appeals for the Eighth Circuit once again overturned the conviction. The Court of Appeals assumed arguendo that an inevitable discovery exception of some sort exists, and also that the body would have been discovered absent the constitutional violation. The Iowa Supreme Court had conceded, however, that the inevitable discovery exception applies only when the police did not act "in bad faith for the purpose of hastening the discovery of the evidence in question." The Iowa court had then passed rather lightly over the "bad faith" question, reasoning that Leaming must have acted in "good faith" because about one half of the judges who had ruled on the case, including the four dissenting Supreme Court Justices, had found no fault with what he did.

Not so, said the federal Court of Appeals; the fact that four Justices approved the conduct does not establish that the officer acted

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41 The exhumation autopsy was performed in Minneapolis by Dr. Garry F. Peterson. Dr. Peterson has written to Professor George Sensabaugh that "despite an interment of about 7 years, I was able to find sperm in the vasa deferentia and in the seminal vesicles." Letter from Garry F. Peterson, M.D. to Dr. George F. Sensabaugh, supra note 37.

42 Williams claimed in the Supreme Court of Iowa that his three attorneys ineffectively represented him by advising him not to testify and by failing to offer the Boucher deposition. See infra text accompanying notes 92-102.


44 Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983), reh'g en banc denied by an equally divided court, 700 F.2d at 1175 (1983).

45 700 F.2d at 1169.


47 The issue of the propriety of the police conduct in this case . . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. Williams, 285 N.W.2d at 260-61.
in good faith. The State had the burden of proof on the issue, and it introduced no testimony by Leaming or anyone else as to whether he had believed he was acting within the Constitution. On the contrary, at oral argument “the State did not question that Leaming broke his word, or that he deliberately and designedly set out to obtain incriminating information.”48 Whatever the dissenters may have thought, the majority and concurring opinions in the Supreme Court had referred to Leaming’s conduct as a “clear” violation of the established Massiah doctrine, as exploitation of “psychological coercion,” and as involving a situation in which police officers dishonored a promise to a lawyer and “deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement.”49 The Court of Appeals thought that breaking the promise might have been justified if Leaming had hoped to find the girl alive, but he had never suggested that this was a possibility and any such hope must have been forlorn after two days of exposure to freezing temperatures.50 The court then went on to note that Leaming had been told that defense counsel would reveal the location of the body, but he did not wish to wait.51 Not only did he break his promise but, in a further display of bad faith, he denied making the promise in the first place.52 Because the State had failed to show that Leaming acted in good faith—i.e., in the belief that his actions were lawful—the “inevitable discovery” exception did not apply and evi-

48 700 F.2d at 1172. 
49 Id. at 1171-172. 
50 Leaming clearly believed that the girl was dead, but other police officers may not have given up all hope. A Lt. Ackerman, on duty in Davenport, advised Williams of his Miranda rights and then asked him only “one question, where was the little girl and was she safe. I told him that we were worried about the safety and health of the little girl, and if she was alive and if she was in the area, we would like to know so that we could get help to her.” Brief for Petitioner, Joint App. at 44-45, Brewer v. Williams, 430 U.S. 587 (1977). I would not assume this concern was insincere. Although all indications were that the girl was dead, even a very small chance of finding her alive was worth pursuing.
51 Williams v. Nix, 700 F.2d at 1172. The court suggested that Leaming knew the police would get the body in the end anyway, but he wanted “also to obtain statements from Williams that could be used against him.” Id. This was also Justice Marshall’s theory in 1977. See supra note 28. It is also possible that Leaming did not believe that defense counsel would really tell the police how to find the body, or that he just wanted to get the credit for finding it.
52 700 F.2d at 1172.
dence derived from the body ought to have been excluded.

The Supreme Court granted a writ of certiorari on May 31, 1983. The Court that will decide the *Williams* case (probably in Spring 1984) for the second time differs in one significant respect from the Court that sat in 1977. Justice Potter Stewart, who authored the majority opinion and who was a crucial "swing" vote on criminal procedure issues for many years, has been replaced by Justice Sandra O'Connor, a relative conservative. Presumably the Court will not reopen the question decided in 1977, but any Justice who is doubtful about whether a constitutional violation occurred is likely to be unenthusiastic about requiring a sweeping remedy.

The Supreme Court of the United States is no exception to the general rule that human behavior is hard to predict, and the Court previously granted certiorari in this very case only to end up affirming the Court of Appeals, but it is unlikely that any Justice would have voted to hear the case a second time unless he or she means to reverse. If the Court does reverse the Court of Appeals and reinstate the conviction, it can do so on any of a number of grounds. It can decide that there is no "bad faith" exception to the inevitable discovery doctrine, or that Detective Learning acted in good faith, or even that the "fruit of the poisonous tree" doctrine does not apply to *Massiah* or *Miranda* violations. There is also the question, passed over in the prior decision, of whether federal habeas corpus relief is available to challenge the use of physical evidence which was discovered by means violating a defendant's Sixth Amendment right to counsel. The Attorneys General of over forty states have joined in an amicus curiae brief asking the Court to extend the doctrine of *Stone v. Powell* to bar federal habeas

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54 428 U.S. 465 (1977). Stone v. Powell held that federal habeas corpus is not available to challenge convictions based on evidence obtained in violation of the Fourth Amendment, if the defendant had a fair hearing in the state courts. Read broadly, the case suggests that federal habeas corpus ought also to be closed to all "fruit of the poisonous tree" claims involving reliable physical evidence. The Supreme Court's previous decision in this case, which came in the same year as the decision in *Stone v. Powell*, side-stepped this issue. Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring). The Supreme Court has not yet extended the rationale of *Stone v. Powell* to claims based on the *Massiah* and *Miranda* cases, perhaps because the rule excluding *statements* obtained in violation of the right to counsel or self-incrimination privilege is arguably more strongly rooted in the Con-
corpus review of state court convictions on this type of constitutional question.

On the other hand, the Court could surprise us and once again throw out the conviction. It could hold that there is no "inevitable discovery" exception to the exclusionary rule, or that the exception is inapplicable because Captain Leaming knew or should have known that he was violating the suspect's constitutional rights. If the Court is willing to go behind the findings of the Iowa Supreme Court and the federal District Court and look at the evidence itself, it may even find that there are grounds for doubting that the body would inevitably have been discovered. That bring us to the present, and a closer look at the legal issues.

III. THE SECOND ROUND IN THE SUPREME COURT: ISSUES AND PROSPECTS

There is every reason to expect that the Supreme Court will recognize an "inevitable discovery" or "hypothetical independent source" exception of some sort. The footnote previously quoted from the 1977 decision does not unequivocably state that there is such an exception, but it seems to assume so. Most courts that have ruled on the question have endorsed the exception in some form, seeing it as a logical extension of the long-recognized "independent source" doctrine. To be sure, any limitation on the rule that evidence obtained unconstitutionally must be excluded tends to weaken the "deterrent effect" by encouraging the police to

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55 See supra text accompanying note 21.
56 Both the "fruit of the poisonous tree" doctrine itself and the independent source limitation stem from Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Cases recognizing and rejecting the "inevitable discovery" principle are collected in the Iowa Supreme Court's opinion in State v. Williams, 285 N.W.2d 248 (Iowa 1979).
57 Although it is common to speak of the exclusionary rule as a "deterrent" to unlawful police activity, the more precise term is "disincentive," since the rule does not punish the police but merely takes away what they have gained through an illegal search, interrogation, or whatever. See infra text accompanying note 66.
hope that "they" (i.e., the law enforcement interests of society) may benefit from unconstitutional activity, but the exclusionary rule has nevertheless been severely restricted, and the tendency is for the restrictions to grow.58

Indeed, the "inevitable discovery" exception is easier to defend in principle than some other well-recognized exceptions to the exclusionary rule — the standing limitation, for example. When the police are allowed to use against B evidence which they obtained by flagrantly violating the constitutional rights of A, such violations are thereby encouraged.69 In contrast, a properly administered inevitable discovery exception gives the authorities only what they would have had if they had not violated the Constitution. The italicized qualification is significant, however. Judges have a great deal of leeway when they are speculating about the answers to hypothetical questions. Some courts may resolve all doubtful questions of inevitable discovery in favor of admissibility, so that evidence whose independent discovery was far from inevitable may come in anyway. The difficulty of curbing this tendency is a legitimate argument against recognizing the exception at all, but such an argument is likely to be persuasive only to persons who are more enthusiastic about controlling police conduct by excluding evidence than the Supreme Court majority has been in recent years.

Assuming that an "inevitable discovery" exception exists, what are its boundaries? The Iowa Supreme Court held that the prosecution must prove that the evidence would (not "might") have been discovered by lawful means absent the constitutional violation, but that it need show this only by a preponderance of the evidence.60 "Would have discovered" thus means "would more

58 The Supreme Court has granted certiorari in three cases (for argument in the 1983-84 Term) to decide whether the exclusionary rule should be cut back substantially by a "reasonable good faith" exception. See 33 Crim. L. Rep. (BNA) 4093-94 (June 29, 1983) for summaries of the cases.

59 It is for this reason that most academic commentators have been critical of the standing requirement. See sources discussed in Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 635 (1983).

60 285 N.W.2d at 260.
likely than not have discovered,” a formulation not so different from “might have discovered.” This is consistent with the burden of proof on some similar questions, although one could argue that a more stringent burden is appropriate given the presumed temptation to resolve doubtful hypothetical questions in favor of admitting evidence. As we have seen, the Iowa Court added another requirement, which became central to the Eighth Circuit’s decision on habeas corpus. The inevitable discovery exception was to be available only where “the police have not acted in bad faith to accelerate the discovery of the evidence in question.”

The Iowa court took this “good faith” limitation from Professor Wayne LaFave’s influential treatise on search and seizure. In endorsing the quoted formulation, proposed originally in a student law review note, LaFave was primarily concerned with a recurring situation involving search warrant procedures. Suppose that police officers have probable cause to search a dwelling, and send one of their number to obtain a warrant. They may be tempted to go ahead and search the premises without waiting for the warrant to issue, even when there are no exigent circumstances to justify such haste, reasoning that a court will overlook any premature entry since the evidence would “inevitably” have been discovered by the lawful search that would have occurred when the judge issued the warrant. To ensure that the officers will wait for the warrant, LaFave reasoned that the evidence discovered prematurely ought to be excluded regardless of what would have happened under the warrant.

LaFave’s concern was that enforcement of the warrant requirement might be undermined by an unthinking application of the inevitable discovery exception, because whenever the police search with probable cause they arguably could have obtained a warrant.

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62 285 N.W.2d at 259.
65 3 W. LAFAVE, supra note 63, at 624.
Perhaps a special proviso is needed to ensure that recognition of
the inevitable discovery exception does not encourage the police to
ignore the warrant requirement, but it does not follow that there
should be a broad doctrine making the exception inapplicable in
all cases involving "bad faith," however defined.

Regardless of good or bad faith, we do not ordinarily "punish"
the police when they violate the Constitution by suppressing evi-
dence that they obtained independently. All we do is to take away
the evidence that they obtained unlawfully, so they are placed in
the same position that they would have been in if they had obeyed
the Constitution. In this sense the exclusionary rule is better de-
scribed as a "disincentive" than as a "deterrent". If we assume
that the police would have found Pamela's body even if Captain
Leaming had not obtained any information from the defendant,
then to suppress evidence derived from the body does much more
than to deprive the State of the "fruits" of an officer's illegality.

Having raised this point I will pursue it no further, however, be-
cause there will be no need for the Supreme Court to set out a
general rule for dealing with "bad faith" cases unless it agrees with
the Court of Appeals that Detective Leaming acted in bad faith.
For reasons I am about to explain, that finding will be powerfully
attacked.

"Bad faith" is not a self-defining concept. If we assume that con-
istitutional rules are on the whole reasonable, there will usually be
a certain degree of fault on the part of an officer who is found to
have violated them. Presumably, bad faith means something more
than that the officer acted in a manner that a court has found, in
retrospect, to have been unreasonable, or coercive. In this instance,
moreover, the question is not whether the officers' faith was so
"good" that the exclusionary rule is altogether inapplicable, but
whether it was so "bad" that the courts will exclude evidence that
would have been found by other officers lawfully. What does "bad

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66 See Kamisar, supra note 58, at 659 n.529, quoting from an unpublished paper of my
own which develops this point.

67 The Court is currently considering whether there ought to be a general "good faith"
exception to the Fourth Amendment exclusionary rule. See supra note 58.
faith” mean in this context?

The Iowa Supreme Court, which brought up the bad faith limitation in the first place, thought that Leaming must have acted in good faith because about half the judges, state and federal, who ruled on the issue found his actions lawful.\textsuperscript{68} The proposition that it is not bad faith for a police officer to take the majority position on a closely debated legal question is at first glance a persuasive one. As we have already seen, the federal Court of Appeals nonetheless disagreed: Leaming must have known he was violating not only the defendant’s right to counsel, but also his own independent promise not to interrogate, when he took advantage of an “inherently coercive” situation by delivering the Christian burial speech. The court thus equated bad faith with knowing or reckless disregard of legal standards.

Leaming himself never testified on the good faith issue. This is not a great loss, because we can better determine a person’s state of mind by inferring it from his actions than by relying on his subsequent self-serving explanations.\textsuperscript{69} Whether Leaming acted in bad

\textsuperscript{68} See supra note 47.

\textsuperscript{69} The State petitioned unsuccessfully for a rehearing \textit{en banc} in the Court of Appeals, claiming that it had not had a fair chance to put on testimony to prove Captain Leaming’s good faith. Williams v. Nix, 700 F.2d at 1173. The good faith issue was raised for the first time in the Iowa Supreme Court’s opinion, and it seems that counsel for the State overconfidently assumed that the Iowa Supreme Court’s finding on this point would be accepted by the federal courts.

Regardless of whether the State should or should not have anticipated that good faith would be a crucial issue, the last thing the Supreme Court ought to do at this point is to order yet another round of hearings. If it is important to know what Captain Leaming would say, here is an excerpt from an interview he gave after the 1977 Supreme Court decision:

“IT [the Christian burial speech] came right from my heart,” he said, leaning forward and placing his palm on his chest.

“I’m a policeman and I don’t consider myself a religious man, but as a young lad I was raised by my parents in the Pentecostal religion.

“That’s Holy Rollers, you know. I went to camp meetings — many of them.

“I can talk their language. Of course, I knew about Williams’ religious background. (He was a self-proclaimed minister and choir leader at a Des Moines church.)

“But what I said to him was not a question, it was a statement, and that ain’t interrogation.

“Had I thought what I was doing was illegal, I wouldn’t have done it. It’s simple as that.”

Des Moines Register, April 7, 1977, at 1B.
faith depends on the meaning we choose to assign to that term, not upon how we resolve any conflicts or ambiguities in the evidence. Leaming acknowledged that he had delivered the Christian burial speech in the hope that it would induce Williams to tell him where the body was, after Williams had made it clear that he wished to consult with McKnight before giving this information. In this sense, he was trying to "get around" the *Miranda* restrictions and to accomplish the very thing that defense lawyers aim to prevent. If this is bad faith, then bad faith is what he had.

On the other hand, it is equally plain that Leaming meant to learn where the body was hidden through means that he thought, however mistakenly, to be constitutional. If he had been truly reckless of constitutional standards, he would not have been so careful to restrict himself to the indirect means he in fact employed. Not only did he carefully refrain from "questioning," but he seems to have made no effort to persuade Williams to confess to the killing. Perhaps it is fair to say that he took a crabbed and legalistic approach to the word "interrogation," but then so did the four Supreme Court Justices who agreed with him, and the six Justices who voted to affirm a conviction on similar facts in *Rhode Island v. Innis*. Were they all acting in bad faith?

There is no reason to doubt that Leaming's intent was to induce Williams to tell him where the body was without literally interrogating him. What is less clear is his motive: was he genuinely concerned about the peace of mind of Pamela's parents, or was he solely interested in obtaining evidence for a conviction? The trouble with even asking this question is that it assumes a distinction that may never have occurred to Leaming, since discovery of the body would further both objectives. In any case, I doubt that the Supreme Court would consider the question of motivation in this sense to be crucial. If Leaming had thought the girl to be still alive, and if his concern had been to find her before she froze to death, interrogation in disregard of what otherwise would be the suspect's rights might be justified. In some societies finding the body for proper burial would be considered a similarly compelling interest, but I would expect the Supreme Court to take a more rationalistic and materialistic view of the importance of burial.

70 446 U.S. 291 (1980). The Supreme Court in this case held that a conversation between two police officers about the danger that a hidden shotgun might be found by some child was not the "functional equivalent of interrogation" under the *Miranda* rule, although it seems to have been intended for the benefit of the listening suspect, who then revealed where he had left the gun. I agree with Chief Justice Burger that the majority opinion does not "clarify the tension between this holding and Brewer v. Williams . . ." 446 U.S. at 304.

That the court in *Brewer* found it necessary to rely on the *Massiah* doctrine rather than the better-known *Miranda* rule makes it all the more difficult to maintain that Captain
A person who knows he has acted wrongly or unlawfully will often be evasive when questioned about his conduct afterwards. Judge Arnold’s opinion for the federal Court of Appeals characterized Leaming as an evasive witness because he denied making an agreement with McKnight, because he contradicted a Davenport lawyer on two other matters, and because the state trial judge believed the lawyers and not the police officer on all of these disputed points. “These are not the actions,” concluded Judge Arnold’s opinion, “of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law.”

The Court of Appeals opinion is particularly vulnerable on this subject, because Leaming’s testimony denying the existence of an agreement was literally uncontradicted. Despite the trial court’s finding, it is clear that the famous “agreement” was neither express nor explicit; it was at most an implied understanding. Pro-

Leaming ought to have been able to anticipate the holding.

71 Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir. 1983).

72 Id.

73 The finding of the original trial judge was that “there was an agreement between defense counsel and police officials to the effect that defendant was not to be questioned on the trip to Des Moines, but that he would talk to police in the presence of his attorney when they arrived. . . .” State v. Williams, 182 N.W.2d 396, 402 (Iowa 1970). This finding was adopted by the federal district judge in the first habeas corpus proceeding, who noted that “This finding by the trial court is amply supported by the testimony of Wendell Nichols, Chief of Police of Des Moines, and by the cross-examination of Detective Leaming.” Williams v. Brewer, 375 F. Supp. 170, 176 n.1 (S.D. Iowa 1974). Chief Nichols acknowledged hearing McKnight tell Williams over the telephone that he would not be questioned on the return trip and that he should not talk about the case before seeing McKnight, but he did not say that he made any promises. Leaming even denied hearing McKnight give these instructions. Probably it was this denial and the conflict with Williams’ Davenport attorney that led the trial judge to express doubts about Leaming’s credibility. See Kamisar, supra note 9, at 212-13 n.23. Whether or not Leaming was truthful about what he overheard, there was no positive evidence of an explicit agreement. McKnight made clear in cross-examination that he felt double-crossed, but he did not testify. There was thus no “swearing contest” for a judge to resolve.

The vague implied understanding that the state and federal trial court judges derived from the record became Captain Leaming’s “express” agreement in the concurring opinions of Justices Powell and Stevens in the 1977 Supreme Court decision. See supra note 8. The authority of these opinions seems to have been sufficient to modify the findings retroactively. Thus, although the 1974 opinion of the Eighth Circuit Court of Appeals said only that there was “an agreement” between the police and counsel, and that “there is substantial justification for the conclusion that Detective Leaming was aware of such agreement,”
Professor Yale Kamisar made an exhaustive examination of the testimony and concluded that "the record does not show an explicit agreement or even that McKnight directly instructed Chief Nichols or Captain Learning that Williams was not to be questioned on the return trip." Kamisar explained that "Apparently both the trial court and federal district court concluded that by their silence the Des Moines police ‘agreed’ to ‘go along’ with McKnight on this matter." Such a finding hardly proves Learning to be a liar.

There is an even stronger reason for challenging Judge Arnold’s portrayal of Learning as an evasive witness. The fact is that Learning brought up the Christian burial speech himself in his testimony when he could easily have concealed it. Once again, I will quote Professor Kamisar’s conclusion:

The first time Captain Learning testified, all he said on direct examination about the Christian burial speech was that shortly after they got on the expressway, he and Williams had “had quite a discussion relative to religion.” That’s all. Only on cross-examination did Learning reveal for the first time — and he more or less volunteered it — that he had made a Christian burial statement. Williams, who had preceded the captain to the witness stand, had never alluded to anything

509 F.2d at 234, the 1983 opinion from the same court (different judges) said that “every court, state or federal, that has made a ruling on the issue has found that the police broke an express promise,” and that “At the oral argument the State did not question that Learning broke his word. . . .” 700 F.2d at 1172 (Emphasis added).

While he was being arraigned in Davenport, Williams approached a lawyer named Kelly because Kelly was the only other black person in the courtroom. Brief for Petitioner, Joint App. at 46-47, Brewer v. Williams, 430 U.S. 387 (1977). Kelly testified at the trial that he had asked for and been refused permission to ride back to Des Moines with Williams, and that he had told Learning that it was his understanding that Williams was not to be questioned on the return trip. Learning denied that Kelly had made this request and statement. The state trial judge made no finding on the conflict but the federal district court, reviewing the transcript six years later, found that the lawyer was telling the truth and the policeman was not. 375 F. Supp. at 176.

Professor Kamisar observed that the trial courts resolved all testimonial conflicts between the defendant and the policeman in favor of the policeman, and all conflicts between the policeman and a lawyer in favor of the lawyer. Kamisar, supra note 9, at 214. Whatever else ought to be said about this method of finding facts, it does not provide a secure platform from which to hurl accusations of bad faith at anyone.

74 Kamisar, supra note 9, at 212-13 n.23.
75 Id.
resembling the Christian burial statement. If it had not hap-
pended to pop out on Leaming’s cross-examination — and it
came out more or less accidentally — there never would have
been a “Christian burial speech case.”\textsuperscript{78}

I would say that this is the act of a man who believed he was doing
the right thing, only to be confounded later on by a close vote on a
question of law.

If we assume that an inevitable discovery rule exists, and that
the “bad faith” claim rests on a misreading of the record, there
remains the question whether and when the body would have been
found if Williams had not led the police to it. The Iowa Supreme
Court found without dissent that the body would have been dis-
covered in essentially the same condition as it was when it was
actually discovered.\textsuperscript{77} The federal District Court made a similar
finding, taking into account evidence which Williams’ habeas
corpus attorney had discovered after the state decision.\textsuperscript{78} It is high-
ly unlikely that the Supreme Court will disturb this unanimity by
undertaking its own examination of the evidence, but to support
an argument that having an inevitable discovery exception is not a
good idea in the first place, one or more of the Justices might as-
sert that the finding is questionable. There is some support in the
record for such an assertion, but it is difficult to say how much.

The reader will recall that the search for Pamela Powers’ body
stopped at the eastern border of Polk County shortly before Wil-
liams led Leaming and other officers to the body at a spot about
two and one-half miles farther west.\textsuperscript{79} The officer who was super-
vising the volunteer searchers testified (at the suppression hearing

\textsuperscript{76} Id. at 235. It would be misleading to give the impression that Kamisar gives Leaming a
clean bill of health as a witness, however. The main point of his article is that all the
testimony about what was said during the ride from Davenport to Des Moines was so vague
and poorly cross-examined that it is impossible to reconstruct what actually happened. It is
not necessary to come to any overall judgment on Leaming's performance as a witness to
recognize that he evidently had no notion that by offering the story of the Christian burial
speech he was converting an open-and-shut murder case into a famous Supreme Court
decision.

\textsuperscript{77} State v. Williams, 285 N.W.2d at 262.

\textsuperscript{78} Williams v. Nix, 528 F. Supp. 664, 671 (S.D. Iowa 1982).

\textsuperscript{79} See supra text at note 25.
before the second trial), that the search would otherwise have continued into Polk County and that the searchers were instructed to get out of their cars and look into culverts. Photographs seemed to show the body plainly visible at the end of a culvert under a side road about two miles from the Interstate. On this evidence, the Iowa Supreme Court's determination that the in-progress search would have discovered the body seems entirely reasonable.

But there is a bit more to it than that. On his habeas corpus petitions (but not his trials), Williams has had the benefit of an exceptionally knowledgeable and resourceful attorney, Professor Robert Bartels. In preparing for the second round habeas corpus petition, Bartels found an earlier photograph which showed the body as it appeared before the police removed snow and otherwise altered the scene. His brief characterizes the largely snow-covered body in this photograph as "barely discernible." I have not seen the photograph and cannot say, but this characterization is supported by undisputed testimony that the officers had difficulty finding the body even after Williams led them to the spot. Bartels also pointed to photographs taken from the road which do not show the culvert itself as visible. The searchers would have left their car only if they had seen a culvert or other likely hiding place from the road.

And that is not quite all. Law enforcement reports written at the time of the search specify only a search of the two counties east of Polk; apparently there were no specific plans to extend the search

80 State v. Williams, 285 N.W.2d at 261-62.
81 "The state also introduced photographs showing the body as it was actually found. Those photographs show that Pamela Power's body would not have been hidden by the inch of snow which accumulated in the area on the evening of December 26. The body was dressed in an orange and white striped blouse, which is what the officer who discovered the body saw first. In addition, the left leg of the body was poised in midair, where it would not have been readily covered by a subsequent snowfall." Id., at 262.
82 Brief of Appellant at 27, Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983).
83 It is true, as defendant argues, that Captain Leaming testified at the first trial that it took officers about five minutes to discover the body after Williams led them to the proper vicinity. While those officers did search on foot, Captain Leaming did not testify that any of them actually went down into the ditch. State v. Williams, 285 N.W.2d at 262.
84 Brief of Appellant at 27-28, Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983).
85 State v. Williams, 285 N.W.2d at 261.
into Polk County. From these reports one could infer that the search terminated at the Polk County line on December 26, 1968, because it was meant to end there, and not because Captain Leaming had obtained Williams' cooperation.

It is difficult to say what to make of this, other than that it illustrates the well-known difficulty of giving definite answers to hypothetical questions. The federal District Court was not overly impressed with the new evidence, observing that the "newly discovered evidence neither adds much to nor subtracts much from the suppression hearing evidence." I would not characterize that as a satisfying response to the petitioner's contentions, but I am not sure what a satisfying response would be. I am sure that there would have been some kind of renewed search after December 26, and it would have been directed specifically to the area of the Mitchellville turnoff, where in fact the body was found. One can be positive of this because Captain Leaming had shrewdly guessed that the body was near Mitchellville and had told Williams that he "knew" it was there. His reasoning was excellent. He knew that the fugitive would be in a hurry to dispose of this highly incriminating evidence, and Mitchellville was the first inviting rural spot east of the Des Moines metropolitan area. Captain Leaming would certainly have organized a thorough search of this area, although it cannot be said with equal certainty that the searchers would have found the body in the snow.

In all likelihood somebody would have found the body eventually, after the snows melted if not before. The question is when and in what condition, and what effect any deterioration in its condition would have had upon the prospects for convicting Williams. The prosecution used scientific evidence derived from the body to prove that the girl was sexually abused and smothered; the defense used the same evidence to show that the assailant may have been sterile. Which side had the most to lose from possible decomposition?

86 Brief of Appellant at 28-30, Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983).
88 Brewer v. Williams, 430 U.S. at 393.
For that matter, which side would have had the most to lose if the body were never discovered? A lawyer’s first impulse is to say the prosecution, because it is difficult to prove murder without a corpse. But in some circumstances the corpus delicti of murder — death of the victim by criminal means — can be established by circumstantial evidence. There are a number of cases affirming convictions of murderers who successfully disposed of the physical remains. In the Williams case the prosecution could have shown that a child mysteriously disappeared, that the defendant almost immediately thereafter left the building in haste with what appeared to be a child’s body wrapped in a blanket, that he drove eastward in an apparent flight to avoid arrest before surrendering, and that he abandoned the blanket, some of the victim’s clothing, and his own blood and semen-stained clothing at a rest stop along his escape route. I doubt very much that a state court would

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91 The circumstances of Williams’ hasty departure from the YMCA are described in State v. Williams, 182 N.W. 2d 396, 399 (Iowa 1971). He told one person that the blanket contained a “mannequin,” but then thwarted efforts by YMCA personnel to view the object by locking his car doors and driving away. Apparently Williams later abandoned the girl’s shoes at a service station, some clothing and the blanket at a highway rest area near Grinnell, and his own automobile in the city of Davenport.

The descriptions in the various opinions about the items found at the Grinnell rest stop are fragmentary because of the limited relevance of this material to the constitutional question. However, these items were very important at the trial, judging by newspaper accounts. Along with Pamela’s slacks and socks, the police found the blanket, a towel, and some of Williams’ clothing. A newspaper account of the second trial discussed the bearing of this evidence on the “sterile rapist” theory:

The defense has focused its cross-examination of witnesses on the issue of sterility. Testimony last week showed there was semen, but no sperm on a man’s shirt and trousers that prosecutors contend Williams dumped at a rest area along Interstate Highway 80 near Grinnell on his way to Davenport after the crime.

The shirt, and a YMCA towel also found at the rest stop, contained type O human blood — the same type as that of the Powers girl (and of about 45 percent of the population).

Type O blood was also found on a bedspread found in Williams’ room at the YMCA. No semen was found on the bedspread and neither blood nor semen was found on the bed sheets, testimony showed.

The defense is expected to use that testimony in its contention that the girl was murdered and sexually molested in another room at the YMCA and the body left on Williams’ bed while he was away from the room.
grant a directed verdict for the defense on this evidence. The defense would have to hope for a jury with very liberal views about the presumption of innocence and the impropriety of drawing inferences from a defendant's silence.

We know that the attorney McKnight and the defendant intended, or said they intended, to reveal the body's location after they had a chance to confer. Although it might seem that such gratuitous assistance to the prosecution would violate a defense lawyer's duty to protect his client's interests, there could have been good reasons for cooperating to this extent. If the defense theory were either that someone else killed the girl and left the body in the defendant's room, or that Williams killed her while legally insane, the defense would have to admit eventually that Williams left the YMCA with the body. The defense could wait and keep its options open, but not without risk. If Williams really was claiming innocence, for example, his lawyer would have to consider the possibility that a prompt autopsy might reveal evidence helpful to the defense, as in fact it did. An appearance of candor and cooperation would be helpful to a defendant who had to persuade people to believe a fantastic sounding theory. For all these reasons, defense counsel could reasonably have concluded that it was in his client's interest to tell the police where the body was hidden.

IV. THE PROSPECTS FOR RETRIAL

Suppose the Supreme Court affirms the judgment of the Court of Appeals, and orders a retrial without the evidence derived from the body. For reasons previously explained, the prosecution would probably be able to establish a prima facie case of murder on circumstantial evidence. That evidence would be extremely stale, of course, but the memories of faltering witnesses can be refreshed by

Suprises in Defense in Williams Trial, Des Moines Sunday Register, July 10, 1977, at 2A. Despite the final sentence, this evidence was more helpful to the prosecution. A story in a Cedar Rapids newspaper about the closing arguments noted that the prosecutor emphasized that the semen deposits on the defendant's clothing, like those in the victim's bodily orifices, contained no sperm. Cedar Rapids Gazette, July 13, 1977, at 1, 3. [A change of venue from Des Moines to Cedar Rapids was granted for the second trial.]

92 See supra notes 26-27.
their prior statements, and transcribed testimony from the earlier trials can substitute for the testimony of those who have died. A retrial would not be technically impossible.

But consider how such a trial would have to be managed. The Williams case has been news in Iowa for a good many years, and it would be front-page news again if it were set for trial after a second Supreme Court decision. Could twelve jurors be found who know nothing about the history of the case? Could they be kept ignorant throughout the trial? Would they be told that the body was never found, or led to believe that no one ever bothered to look for it?

Imagine the position of defense counsel, arguing to the judge for a directed verdict or to the jury on reasonable doubt. Would he claim that, the body never having been found, Pamela may be alive today and living somewhere under an assumed name at the age of 26? Or would he introduce the autopsy evidence himself in support of the “sterile rapist” theory, and thus bring the body right back into the case?

Perhaps at a third trial Williams himself would at last give an account of how he came to be in possession of a corpse. The reader may already have wondered why Williams did not testify at either trial, given the defense theory. Judges and prosecutors are not allowed to comment in court upon a defendant’s decision not to take the stand, but this rule does not extend, as far as I know, to comments by professors in law journals. So I ask the obvious question: is it conceivable that an innocent man would not take the stand to explain how he happened to be leaving the YMCA with the body of a very recently murdered child?

As it happens, Williams himself has apparently been asking the same question. In his appeal of the second conviction to the Iowa Supreme Court, Williams argued that his team of three defense lawyers ineffectively represented him when they unanimously advised him not to testify.93 His decision to accept their advice was

93 The claim of ineffective assistance, which cited counsel’s decision not to introduce the Boucher deposition (see supra note 39), as well as the advice to the defendant not to testify, is summarized in State v. Williams, 285 N.W.2d 248, 270-71 (Iowa 1979). The Iowa
made part of the record at a conference in the Court Reporter's office with the judge not present. 84

The story of why he did not testify is every bit as fascinating as the story of how he came to tell Captain Learning about the body. It seems that counsel told Williams that there were considerations on both sides. On the one hand, counsel thought that jurors traditionally like to see the defendant take the stand. On the other hand, the fact that he had been "in a mental institution" might come out if he testified, and a Dr. Gambill "could come here to testify." All these considerations had been explained to Williams in detail at a prior conference at which one of the lawyers had argued the case for the defendant testifying. On balance, all three lawyers felt that he should not testify, and Williams himself agreed.

To understand the issue of ineffective representation more facts are needed. According to newspaper accounts, Williams was charged with statutory rape in Missouri in 1965 in connection with sexual incidents involving two small girls. 85 The presiding magistrate found him not guilty by reason of insanity and ordered him committed to a mental institution. He was eventually transferred to an open ward, from which he walked away on July 4, 1968. 86

And there is more. The aforementioned Dr. Gambill interviewed Williams by court order in April, 1969, to determine if he was competent to stand trial. Here is how Appellant's brief in the Supreme Court of Iowa described that interview:

At the beginning of the interview, Dr. Gambill told Defendant that this conversation would not be confidential, and that it could be reported to the Court. During the interview, Dr. Gambill asked for and received Defendant's version of what

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84 Excerpts from the transcript are quoted in the Brief of the Appellant in State v. Williams, 295 N.W.2d 248 (Iowa 1979). The account of the conference in the text is based on the excerpts in this brief.

85 Williams Still 'Wanted' in Missouri, Des Moines Register, March 29, 1977, at 1A.

86 Id.
occurred on the day of the crime, a version which was exculpatory with regard to whether Defendant had killed the victim. However, Defendant also related to Dr. Gambill a different version than he had previously told to his attorney, Mr. McKnight, a version which involved the Defendant’s luring a young girl to his room and then molesting her, killing her, and carrying her out. Defendant explained that he had given McKnight this version because Mr. McKnight had goaded him into it. Dr. Gambill had learned of this version from Mr. McKnight himself, and had asked Defendant about it directly. Dr. Gambill also testified that he had concluded that Defendant did not trust Mr. McKnight.97

I agree with counsel’s judgment that disclosure of this information to the jury would be extremely damaging to the defense. But was any of this admissible to impeach the defendant’s testimony? Williams’ main appellate counsel (who as trial counsel had joined in the advice) argued that none of it could have come in. Citing a number of state and federal cases, the brief argued that the circumstances of the mental commitment related to sexual assaults and thus had “no real bearing on credibility,”88 that due process would not permit the contents of the psychiatric interview to be used against the defendant on the merits,99 and that it was an “incredible violation of the attorney-client privilege” for McKnight to tell the doctor that his client had admitted the killing.100 The brief acknowledged that Harris v. New York101 had held that some unconstitutionally obtained evidence that may not be used to prove guilt may be used to impeach, but it argued that Harris applies

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97 Brief for Appellant at 80, State v. Williams, 295 N.W.2d 248 (Iowa 1979). I have not seen the transcript of Dr. Gambill’s testimony at the competency proceeding, but I suspect that the guarded description in the brief does not fully convey its impact.

88 Id. State v. Martin, 217 N.W.2d 536 (Iowa 1974), had held that prior felony convictions may be used to impeach a testifying defendant only where they involve some element of dishonesty that is relevant to his credibility (as opposed to his propensity to commit this type of crime). Of course, a mental commitment is not a felony conviction, and so its admissibility for impeachment is doubly doubtful. I would not like to undertake the assignment of defending the proposition that this information had no rational bearing on the credibility of the defense theory.

99 Brief for Appellant at 80-81, State v. Williams, 295 N.W.2d 248 (Iowa 1979).

100 Id. at 82.

only to statements obtained in violation of the *Miranda* rule, and not to "a due process, attorney-client privilege, or right-to-counsel violation."\(^{102}\) In any event, trial counsel ought to have asked the judge to rule on the admissibility of these items before deciding whether the defendant would testify.\(^{103}\)

There is no reason to go into these arguments in detail, because the claim of ineffective representation is not presently before the Supreme Court or any other court. If we take this claim at all seriously, however, we must suppose that Williams means to take the stand if he has another opportunity, assuming that the prosecution is able to make out a *prima facie* case, and assuming that the judge agrees to exclude the devastating impeachment material that caused him to stay off the witness stand previously. If he does testify, the case may take a surprising turn. I am sure that the prosecutor will want to make the point that the defendant has had more than 15 years to come up with an exculpatory story, and that the jury should not credit so belated an account. But Williams never displayed any particular reluctance to tell what he knew. He promised Captain Leaming that he would tell the whole story as soon as he obtained McKnight's permission, and he has kept silent since then only because he has been virtually ordered to do so by a succession of defense attorneys. "What a shame," I can imagine counsel explaining to the jury, "that this man fell into the hands of game-playing lawyers and a legal system that is single-mindedly bent on suppressing evidence and keeping suspects silent. If only he had been encouraged to tell his story from the beginning, prompt investigation of it might have led to the arrest of the guilty party and saved an innocent man from wrongful imprisonment."

V. CONCLUDING REFLECTIONS

Judge Arnold, who wrote the opinion for the Federal Court of Appeals throwing out the conviction a second time, realized that many people would consider it absurd to show so much concern about Captain Leaming's speech and so little concern about punishing the murderer of Pamela Powers. The judge replied to this


\(^{103}\) *Id.* at 83.
anticipated criticism at the end of his opinion:

It will inevitably be remarked that our opinion focuses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.\(^{104}\)

This passage is splendid as rhetoric, but I wonder if such a single-minded determination to keep local law enforcement officials "in their place" is any more satisfactory than its mirror image, the determination to convict the guilty no matter what the cost to other values. Federal judges are government servants too, but unlike policemen they have authority to make up the rules as well as apply them, and so it is doubly important that they cultivate self restraint and good judgment. Overturning the Williams conviction the first time could be justified as a dramatic means of drawing a line between permitted "conversation" and forbidden "interrogation." That decision imposed very tangible costs on the State of Iowa, and I am sure it imposed heavy intangible costs on the family of the murdered girl. It also gave Williams an enormous benefit, although not the benefit the Supreme Court had in mind. He obtained another chance at acquittal on the merits, with a much better prepared defense. The question after all this history is not whether there ought to be an appropriate remedy for constitutional violations, but why the remedy already granted was not sufficient.

\(^{104}\) Williams v. Nix, 700 F.2d at 1173.
The fact that constitutional law is complex and technical suggests to me that it should be enforced with a sense of proportion. Granting that Captain Leaming crossed a certain line that the Supreme Court has drawn, and even granting that he ought to have known better, his misdeed was what we criminal lawyers call *malum prohibitum*, rather than *malum in se*. Legalisms aside, what he did was to appeal to the conscience of a suspected murderer to do the only decent and honorable thing: to reveal where he had hidden the body, so the police could recover it and return it to the grieving family for burial. Perhaps the police ought not to be allowed to make such an appeal to a suspect in their custody, but in my opinion *somebody* ought to do it.

We have stringent rules governing police interrogation of suspects for good reason. Not so long ago, the "third degree" was a standard and acknowledged police investigative tool. Suspects were arrested and rearrested on flimsy grounds, kept awake while relays of questioners wore them down, stripped naked and threatened with beatings, pressured, cajoled, and tricked into confessing. The characteristic vice of dedicated policemen is that they tend to see themselves as fighting a war against the criminal elements of society. From this it is only a short step to the conclusion that the end justifies the means. The courts are entirely right to take strong measures to keep this mentality in check.

But we lawyers, a class which includes judges, also have our characteristic faults. One of these is a tendency to make a fetish of procedure, so that the merits of a dispute become obscured in an endless tangle of arguments about how the dispute ought to have been resolved. Another is a tendency to become captured by our own abstractions, so that we push every principle to the limits of its logic and sometimes beyond. Society has police to protect it from thieves and murderers, and it has lawyers to protect it from the police. No one has yet discovered how to protect society from the lawyers.